POINT I.

Whether the Waiver Herein Extended the Period for Collection Is a Matter, Primarily, of Intention of the Parties Under the Law as It Existed at the Time the Waiver Was Executed.

The waiver herein must be construed, not only from the viewpoint of its legal implications, but also from the common sense viewpoint of what the law was at the time it was executed and what the parties intended it to cover. In other words it must not be distorted to cover a situation which neither party knew existed at the time of its execution. At the time the waiver was signed, November 14, 1922, neither the taxpayer nor the government believed waivers of the period for assessment had anything to do with the waiving of the period for collection. It was not until the decision of this Court in Bowers v. New York & Albany Lighterage Co., 273 U. S. 346, February 21, 1927, that the government realized that not only must the tax be *assessed* within the five-year period but also collected within that period. Prior to that decision the government supposed that if "assessed" within five years, the tax could be collected by distraint, at any time. This supposition was destroyed by this Court's decision that the bar against a "proceeding," erected by Section 250(d), included a "proceeding" by distraint. It was only at this time that waivers under the 1921 Act began to assume importance *from the viewpoint of collection.*

That this was the fact is evident from the office decision of the Bureau of Internal Revenue published in

Cumulative Bulletin I-2 for July to December, 1922 (I. T. 1446, p. 218), covering the very period in which the waiver herein was executed, holding that where a tax was assessed within the statutory period of limitation it could be collected at any time thereafter. The Bureau said that the five-year limitation upon a "suit or proceeding" contained in Sec. 250(d) of the 1921 Act referred "only to judicial proceedings." Hence the tax could be collected by distraint at any time. This view was held continuously by the Bureau until it was overturned by the Court in Bowers v. New York & Albany Lighterage Co., *supra.*

In view of the importance of this question a more extended examination of the situation which existed with reference to waivers under revenue acts prior to the 1921 Act may be of value.

Prior to the Revenue Act of 1921 there was no broad and definite provision of law regarding any restriction on the assessment and collection of income and excess profits taxes for taxable periods prior to 1918. (Bowers v. New York & Albany Lighterage Co., 273 U. S. 346.)

In the Acts of 1909, 1913 and 1916 there was a common provision which placed a limited restriction on the powers of the Commissioner of Internal Revenue to assess and collect taxes. This provision was to the effect that if in the case of erroneous, false or fraudulent returns a discovery of such fact was made within three years of the due date of the return, the tax should be assessed and paid immediately by the taxpayer (1909 Act, Sec. 38, par. 5; 1913 Act, Secs. G, C, par. 6; 1916 Act, Sec. 14a). Other than this restriction there was no limitation on the right and power of the Com-

missioner to collect taxes. The Bureau could collect taxes by suit at any time under these acts, but it was reluctant to proceed in this manner if it could be avoided. Consequently, it was deemed advisable to make some provision for the assessment of taxes which were discovered after the expiration of three years from the due date of the return. (Sol. Op. 92, C. B. 4, p. 325; Sol. Op. 60 and 79, C. B. 3, pp. 295, 302.)

As a result the Bureau devised and sent out to taxpayers a waiver form. This form provided only for assessment of the tax. No provision was made in these waivers for collection of the tax because it was unnecessary. As before noted, there was no limitation on collection. The only object in view was to give the Commissioner the right to assess the tax in the regular manner if such tax was discovered more than three years after the return was due. There was no provision in the Acts of 1909, 1913, 1916 and 1917 for these waivers and they were issued by the Commissioner on his own initiative.

When the Revenue Act of 1921 became law the situation in regard to the assessment and collection of taxes was completely changed. Section 250(d) of that Act provided specifically as to the manner in which taxes should be assessed and collected by a statutory limitation of five years. Provision was also made for waivers and this was as specific as the statutory limitation.

This section of the law, therefore, set up a complete and specific limitation period for those taxable years which theretofore had not been governed by a statute of limitations except in a restricted sense.

The Commissioner no longer had the right to collect

taxes at any time by suit nor the right to assess and collect taxes in the ordinary manner if discovery of the taxes was not made within a certain time. The law prescribed that assessment and collection must be made within a definite period and this was irrespective of the method pursued, whether the tax was first assessed in the ordinary manner and then collected or collected by suit without assessment.

After the passage of the Revenue Act of 1921 the Bureau made no immediate change in the waiver form. This is evident from a reading of the waiver herein, given November, 1922. The Bureau apparently still believed that a waiver of the period for assessment was all that was necessary, assuming, as it did, that distraint could be made at any time.

That a waiver of "assessment" was not considered to have anything to do with "collection" is evident from Commissioner's Mimeograph 3085 (C. B. II-1, p. 174). It is stated therein that assessment waivers on file for the year 1917 would be held to expire on April 1, 1924. There is no statement in the mimeograph concerning collection because as above stated the Bureau believed there was no restriction on this Act where assessment was properly made.

It seems clear, therefore, that it was not until after the decision of this Court in the case of the New York & Albany Lighterage Co., *supra,* in February, 1927, that the Commissioner advanced the theory that collection of the tax was implied in a waiver which provided only for assessment of the tax.

This conclusion is substantiated by a reference to the case of Toxaway Mills v. U. S., decided March 14, 1927 (273 U. S. 781). In that case there was a waiver

which provided only for assessment given prior to the Revenue Act of 1921, and upon which waiver the Commissioner based his right to collect the tax. The Court of Claims decided against the taxpayer and this Court granted certiorari. Immediately after the decision of this Court in the New York & Albany Lighterage Co. case the Solicitor General of the United States confessed error. This indicates that up until this time the Commissioner had not evolved the theory, or at least placed no reliance in it, that collection was implied in an assessment waiver. If this theory had been born at that time it is more than likely that it would have been advanced in the Toxaway Mills case as it was as applicable to that case as to the present case.

Summing up, therefore, the following may be gleaned from the situation as it existed in November, 1922, when the waiver was executed:

(1) The Commissioner believed that if assessment was made within the five-year period, collection could be made at any time thereafter;

(2) The taxpayer believed that he was waiving the period of *assessment only* for the reason that both the Commissioner and himself believed, *at that time,* that a tax assessed *within* the period could be collected *after* the period by distraint;

(3) The waiver was prepared by the Commissioner to suit his own purposes. If the Commissioner had intended it to cover collection he could easily have inserted the word "collection" in the context. Neither party inserted "collection" because neither party deemed it necessary. One

party, i.e., the Government, now prays that it be read into the word "assessment."

It follows that the attempt now made to spell out a waiver of the period of collection from a waiver of the period of assessment, when neither party had any notion that the waiver referred to collection, at the time it was executed, is an attempt on the part of the government to repair, at this late date (it was unthought of even at the time error was confessed in the Toxaway Mills case, *supra*, in the year 1927) the mistake which it only discovered upon the decision of the New York & Albany Lighterage Co. case, in February, 1927.

It amounts to the contention that because the waiver of "assessment" now turns out in the light of the New York & Albany Lighterage Co. decision, to be unproductive to the government, it must now be construed to waive "collection."

It is sufficient to answer that not only does the waiver say nothing about collection on its face, but that the idea itself was absent from the minds of both parties at the time of its execution.

POINT II.

The Decision of the Court of Claims.

The Court of Claims held the waiver authorized collection on the ground that if it did not, its execution was an idle performance. Aside from the doubtful logic of such a conclusion, it is clear, from a reading of Point I, herein, that *at the time the waiver was*

executed, it had a function entirely distinct from extending the time for collection. At that time, in the minds of both parties, it extended the period for *assessment,* which, in turn, under the Commissioner's then construction of the law, enabled him to distrain at any time thereafter. It is therefore no argument to contend that it *must* have been intended to cover collection, otherwise it would have had no reason for existence. Its reason for existence was exactly what it attempted to do on its face, namely, extend the time for assessment which the Commissioner regarded as sufficient for his purposes on that occasion.

To charge both parties, in doing an act in 1922, with knowledge of an interpretation of the law only arrived at by this Court in 1927, and to alter the plain intention not only of one, but of both parties, on the ground that, as the law was subsequently discovered to be (five years later), the waiver would be unhelpful to the government, is, we submit, in accordance with no rule of legal construction.

The statement therefore by the Court of Claims

> "Whether plaintiff so intended or not, he and his attorneys must have known that the Commissioner accepted the waiver believing that it authorized the collection of any tax properly assessed,"

is again of doubtful logic, for obviously the belief of the Commissioner is no ground for altering the plain meaning of the waiver. There is, however, a sufficient answer: the taxpayer believed, in signing the waiver, that when he authorized assessment, *the law, not the waiver of the taxpayer,* authorized distraint. This belief he subsequently discovered to be erroneous, upon

the decision of this Court of the New York & Albany Lighterage Co. case, *supra*. The waiver then became a nullity. This was a far different situation from executing a waiver freely and with full knowledge that the act itself subjected the taxpayer to additional liability.

CONCLUSION.

The judgment below should be reversed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 23.—October Term, 1930.

Charles H. Stange, Petitioner,
vs.
The United States.
} On Writ of Certiorari to the Court of Claims.

[January 5, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

In February, 1915, Stange made a return of taxable income for the year 1914, under the Revenue Act of October 3, 1913, c. 16, 38 Stat. 114, and paid the tax assessed thereon. In February, 1924, the Commissioner of Internal Revenue made a deficiency assessment. Proceedings for collection were instituted in March, 1925. In order to avoid distraint, Stange paid the amount assessed with interest and duly made claim for a refund on the ground that the return made in 1915 had included all the income taxable. Upon the rejection of this claim, he filed a supplementary claim for a refund on the ground that the collection of the additional tax had been barred by the statute of limitations contained in § 250 (d) of the Revenue Act of November 23, 1921, c. 136, 42 Stat. 227, 265. After the lapse of six months without a determination by the Commissioner, he brought this suit in the Court of Claims to recover the money so paid. There he urged both contentions. In answer to the latter, the Government insisted that the statute had been waived by a written agreement signed by Stange in November, 1922, and by the Commissioner in March, 1923. The trial court entered judgment for the United States. 68 Ct. Cl. 395. This Court granted a writ of certiorari, limited "to the questions involving the validity and effect of the waiver of the statute of limitations." 281 U. S. 707.

No constitutional question is presented. Whether the petitioner is entitled to recover depends upon the construction and effect of § 250 (d) and of the written agreement called the waiver. That section provides: